

May 28, 2002

Honorable Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
Dockets Room, Room 1A, East
888 First Street, N.E.
Washington, D.C. 20426

Re: *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*
FERC Docket Nos. EL01-10 *et al.*

Dear Secretary Salas,

Transmitted for filing with the Commission is the Joint Answer of the Washington Utilities and Transportation Commission, the Oregon Office of Energy, and the Oregon Public Utilities Commission to the City of Tacoma's Motion to Reopen the Evidentiary Record in the above-captioned proceedings. We are also sending by overnight mail an original and 14 copies of this document.

Very truly yours,

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Transportation Commission
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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc.,)	
)	
Complainant,)	Docket No. EL01-10-000
)	Docket No. EL01-10-001
)	
v.)	
)	
All Jurisdictional Sellers of Energy and/or)	
Capacity at Wholesale Into Electric Energy)	
and/or Capacity Markets in the Pacific)	
Northwest, Including Parties to the Western)	
Systems Power Pool Agreement,)	
)	
Respondents.)	
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**ANSWER OF THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, OREGON OFFICE OF ENERGY, AND OREGON PUBLIC
UTILITY COMMISSION TO MOTION OF THE CITY OF TACOMA,
WASHINGTON TO REOPEN THE EVIDENTIARY RECORD**

***Recommending That the Commission Investigate Market Manipulation and Focus Any
Refund or Other Appropriate Sanctions on Wrongdoers***

Pursuant to Rules 213 and 716 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.213, 385.716, the Washington Utilities and Transportation Commission, the Oregon Office of Energy, and the Oregon Public Utility Commission ("Washington and Oregon Agencies") file this Answer to the Motion of the City of Tacoma, Washington ("Tacoma") to reopen the evidentiary record in this proceeding (the "Pacific Northwest Refunds Proceeding").

The Washington and Oregon Agencies recommend that the Commission aggressively investigate whether manipulation of the western power markets occurred

during the period of time in question in this proceeding and whether that manipulation led to unjust and unreasonable wholesale power costs in western wholesale power markets, including the markets in the Pacific Northwest. If the Commission chooses to grant Tacoma's Motion and reopen this proceeding, we recommend that it be for the purpose of investigating the facts and consequences of market manipulation. *The Washington and Oregon Agencies urge the Commission to not confuse the wrong with the remedy.* The Commission should focus its inquiry on whether wrongdoing took place and focus its remedies, if any, on the wrongdoers. The Commission should not impose a refund remedy broadly on the innocent as well as the guilty. Such a remedy would unavoidably be patchwork in application and inequitable in consequence.

I. INTEREST OF THE WASHINGTON AND OREGON AGENCIES

The Washington¹ and Oregon Agencies intervened in the Pacific Northwest Refund Proceeding² and are members of the State Entities Group established by Presiding Administrative Law Judge Carmen A. Cintron. *Order Approving Groups*, Docket Nos. EL01-10-000 and EL01-10-001, issued August 8, 2001. We appear in this proceeding because we are duty-bound to represent the interests of our respective states, their businesses, and their general public, in matters before the Commission that affect the rates or practices of utility service.

¹Pursuant to Revised Code of Washington (RCW) 80.01.075, the Washington Utilities and Transportation Commission has authority to appear before the Commission in proceedings in which there is at issue the rates or practices of utility service affecting the interests of the state of Washington, its businesses, and the general public.

²*Puget Sound Energy, Inc. v. All Jurisdictional Sellers, et al.*, 96 FERC ¶ 61,120, slip op. at 42-43 (2001).

II. PROCEDURAL HISTORY

The Commission initiated the Pacific Northwest Refunds Proceeding by order issued July 25, 2001. *San Diego Gas & Electric Company*, 96 FERC ¶ 61,120 at 61,520 (2001). In that order, the Commission required a preliminary evidentiary hearing:

to facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001. The record should establish the volume of the transactions, the identification of the net sellers and net buyers, the price and terms and conditions of the sales contracts, and the extent of potential refunds. This record would help the Commission determine the extent to which the dysfunctions in the California markets may have affected decisions in the Pacific Northwest.

The Presiding Judge was directed to make a recommendation and certify the record and findings of fact seven days after conclusion of the evidentiary hearing.

In accordance with the Commission's order, Presiding Administrative Law Judge Carmen A. Cintron issued her Recommendations and Proposed Findings of Fact on September 24, 2001. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 96 FERC ¶ 63,044 (2001) ("Recommendation"). Judge Cintron found that prices for bilateral spot market sales in the Pacific Northwest were not unjust and unreasonable during the potential refund period. Therefore, she recommended that the Pacific Northwest Refund Proceeding be terminated because no basis in law exists to order refunds.

The Commission invited the parties to file comments on the Recommendation. Since the comment date of October 31, 2001, the Commission has taken no further definitive action in the Pacific Northwest Refunds Proceeding.³

³The Commission addressed this proceeding on December 19, 2001, saying "Once the Commission has had an opportunity to consider the comments, we will issue an order on the merits of the

The Washington and Oregon Agencies submitted a brief and proposed Findings of Fact based on the evidentiary record and submitted comments on the Recommendation. The Washington and Oregon Agencies recommended that the Commission exercise its discretion not to order refunds as a remedy but to dismiss the Pacific Northwest Refunds Proceeding because, among other reasons, a refund remedy would, in those circumstances, be unfair, inequitable and impractical. The Washington and Oregon Agencies did *not* concur in the finding of the Recommendation that rates for wholesale, spot-market power in the Pacific Northwest were not unjust or unreasonable during the refund period.

III. TACOMA'S MOTION

Tacoma moves to reopen the evidentiary record citing, among other things, recently released information that certain parties may have engaged in transactions and other activities to manipulate markets and materially affect prices for spot-market power in California, as well as the Pacific Northwest.⁴ Tacoma argues that this evidence was not disclosed or discovered during the expedited hearing and therefore not considered by the Presiding Judge when she concluded that prices for wholesale, spot-market power were not unjust nor unreasonable and that those prices were the result of a freely functioning market. *Tacoma Motion* at 2. Tacoma argues that the recently released

issues pending in that proceeding.” *Order on Clarification and Rehearing*, 97 FERC ¶ 61,275, slip op. at 173 (2001).

⁴See Letter from Donald J. Gelinas, Associate Director, Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, to Sam Behrends, IV, Esq., dated May 6, 2002, and attachments thereto, available on the Commission’s web page for FERC Docket No. PA02-2-000.

information documents the exercise of market-power and demonstrates that the findings of fact on which the Recommendation are based are “clearly erroneous.” *Id.* at 2.

In addition, Tacoma cites the evidentiary hearing required by the Commission to examine whether long-term bilateral markets were adversely affected by dysfunctional California spot markets and whether individual, long-term bilateral contracts should be modified.⁵ *Id.* at 3. Tacoma points to this proceeding as evidence that the limitation to spot-market transactions in the Pacific Northwest Refund Proceeding and the Recommendation was inappropriate and inconsistent with this later proceeding. *Id.*

IV. COMMENTS OF THE WASHINGTON AND OREGON AGENCIES

Whether or not it grants Tacoma’s motion in this proceeding, we strongly recommend that the Commission vigorously investigate whether parties transacting business in the power markets of California and the broader Western Interconnection engaged in market manipulation or exercised any other inappropriate or illegal form of market-power. The Commission is the sole regulator of the wholesale power market. If competition is ever fully to replace direct price regulation in wholesale power markets, the Commission must satisfy itself, and those who rely on the protection of its regulation, that abuses of market power and manipulation of markets can be recognized, diagnosed, remedied and appropriately sanctioned.

However, if the Commission grants Tacoma’s motion to reopen the record in this proceeding, the Washington and Oregon Agencies urge the Commission not to confuse the pursuit of wrongdoing with the application of a retroactive refund remedy. The

⁵*Nevada Power Company, et al. v. Duke Energy Trading and Marketing, L.L.C., et al.*, 99 FERC ¶ 61,047 (2002).

Commission *should not* apply a retroactive refund remedy in blanket fashion to all parties that transacted power trades in the Northwest—disregarding whether those parties are blameworthy or innocent of wrongdoing. Rather, the Commission should confine and target any refund, sanction, or other remedy only to those parties, if any, that are found to have adversely affected prices through exercise of market manipulation or other market power.

In both the brief and the comments, the Washington and Oregon Agencies argued against a general retroactive refund remedy, even if rates were found to be unjust and unreasonable. We took this position because, based on the factual record developed in this proceeding, it would be inequitable and inappropriate for the Commission to order refunds for Pacific Northwest utilities. We recommended that: “This proceeding should be terminated and the Commission’s attention directed to prospective mitigation measures that are being addressed in other proceedings.”⁶

We continue to recommend that the Commission not impose retroactive refunds as a general remedy for any unjust or unreasonable rates during the refund period in question. Such a policy would punish the innocent along with the wrongdoers and would for other important reasons be inequitable. We reiterate and summarize here two of the key reasons for the recommendation opposing retroactive refunds.

A. The Commission’s jurisdiction is limited. Any retroactive refund policy would inevitably apply unfairly and disproportionately across the classes of wholesale market participants.

⁶The examination of bilateral, long-term contracts and the prospective reform of those contracts in Docket EL02-26 is just such a proceeding.

A large proportion of the power bought and sold in the Pacific Northwest is sold by non-jurisdictional utilities (e.g., municipal utilities, public utility districts, the Bonneville Power Administration, etc.).⁷ The Commission's jurisdiction over wholesale power transactions does not extend to these utilities and it cannot legally impose refund obligations on these sales. Consequently, the burden of paying refunds would fall on a limited class of jurisdictional sellers in the region; and the benefit of receiving refunds would be available only to buyers who bought from those same sellers. Some entities—Commission-jurisdictional utilities—would be subject to pay refunds, but not entitled to receive refunds from non-jurisdictional utilities that sold power at the very same elevated and volatile prices. This asymmetry would be an inequitable outcome serving not to remedy the market dysfunction, but rather to send the bill for market dysfunction to sellers who comprise only a portion of the market-sales volume.

B. A retroactive refund policy based on spot market transactions only would be biased and therefore inequitable.

Any “spot market” definition the Commission might ultimately approve for calculation of retroactive refunds in the Pacific Northwest would, necessarily, draw a line between transactions that qualify for refunds and those that do not. This distinction would cause the burden or benefit of refunds to be distributed arbitrarily among the parties. The utilities in the region faced differing resource portfolio requirements during

⁷The term public utility creates some confusion in the Northwest because we use this term to refer to publicly owned utilities like municipal utilities and public utility districts. In the language of the Federal Power Act, public utilities are those entities jurisdictional to the Commission, which are referred to as investor-owned utilities. For purposes of the point made here, we are labeling utilities and federal power marketing authorities that are not jurisdictional to the Commission as “non-jurisdictional utilities.”

the refund period and pursued resource strategies that involved a greater or lesser degree of reliance on short-term markets. If, for example, refund calculations were limited to short-term transactions, as the Commission's previous orders have done, utilities that bought power in longer-term markets would be precluded from obtaining refunds, but might face the obligation to pay refunds for power obtained under forward contracts later sold in the short-term markets. Effectively, this exclusion of longer-term contracts punishes utilities that bought forward-market power and benefits those that relied most heavily on short-term transactions. This exclusion is not only inequitable, but also counter to the admonition of the Commission beginning at least as early as November 2000 for utilities to rely less on short-term purchases and more on forward transactions. *San Diego Gas & Electric Company, et. al.*, 93 FERC ¶ 61,121, at 61,389 (2000) (November 1st Order); *San Diego Gas & Electric Company, et. al.*, 93 FERC ¶ 61,294, at 61,996 (2000) (December 15th Order).

Limiting the refund investigation to a class of transactions identified as "spot market," however that term is defined in the Pacific Northwest, fails to recognize that a mix of both spot and longer-term markets is important in the region, and would produce refund amounts that are inherently inequitable and arbitrarily distributed among utilities based on past resource circumstances and resource strategies.

V. CONCLUSION

The Washington and Oregon Agencies urge that the Commission vigorously investigate whether market power or market manipulation caused or contributed to the dysfunction of western wholesale power markets during 2000 and 2001. If the Commission grants Tacoma's motion to pursue evidence of such market failure, the

Washington and Oregon Agencies recommend the Commission focus any refund obligation or other sanction specifically on those parties found to have exercised market power or manipulation. We continue to recommend that the Commission exercise caution when using its discretion to order refunds. Even if rates are found to have been unjust and unreasonable, the Commission should take pains to avoid refund policies that are biased and inequitable.

Dated May 28, 2002.

Respectfully submitted,

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